



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Deep Ocean Engineering

File: B-238450

Date: April 24, 1990

Philip J. Ballou, for the protester.
Lawrence W. Gray, for Benthos, Inc., an interested party.
Jonathan H. Kosarin, Esq., and Robert E. Young, Esq.,
Department of the Navy, for the agency.
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that agency in negotiated brand name or equal procurement improperly made award to firm whose proposal did not meet certain salient characteristics is denied where protester does not demonstrate that agency's technical judgement that awardee's proposal met the salient characteristics was unreasonable.

DECISION

Deep Ocean Engineering protests the award of a firm, fixed-price contract to Benthos, Inc., under request for proposals (RFP) No. N62306-89-R-0024, issued by the Naval Oceanographic Office, Mississippi, for a tethered remotely operated vehicle (ROV) system, including sonar, recorder, navigation system, spares kits, specialized test equipment and training. The ROV is used for locating, inspecting and identifying underwater targets. Deep Ocean asserts that the award to Benthos is improper because Benthos's vehicle is not equal to the brand name product which is manufactured by the protester.

We deny the protest.

The RFP solicited offers on a "brand name or equal" basis, identifying the Deep Ocean Phantom HVS4 as the brand name product. The RFP listed several salient characteristics of the brand name item and also listed optional equipment to be provided as required. The RFP also contained the brand name or equal clause which appears at Department of Defense

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Federal Acquisition Regulation Supplement (DFARS) § 252.210-7000 (1988 ed.). The clause provides that the determination of equality of an offered product will be based "on information furnished by the offeror or identified in his proposal, as well as other information reasonably available to the purchasing activity." The clause also called for submission of all descriptive materials necessary for the agency to determine whether the product offered met the RFP's salient characteristics. Award was to be made to the offeror whose offer conforming to the solicitation was most advantageous to the government.

Three firms submitted offers, and the Navy conducted technical evaluations of those offers to determine whether the products proposed met the salient characteristics. Deep Ocean submitted descriptive literature on its brand name, Phantom HVS4. Benthos submitted descriptive literature on its SeaRover ROV as "equal" to the Deep Ocean brand name model. Under the Navy's initial evaluation, both systems were determined to satisfy the salient characteristics. The Navy, however, by amendment No. 0002, revised the salient characteristics with respect to speed and spare parts kit, and extended the closing date to August 24, 1989.

Benthos responded with a detailed technical proposal which provided data to show compliance with both the original and revised salient characteristics. Benthos's offer was considered to be reasonably susceptible of being made acceptable. Deep Ocean was found to be technically acceptable. Discussions were conducted with all offerors.

The RFP was further revised to incorporate additional required clauses and to request the submission of revised offers. After receiving these revised offers, the Navy still had questions concerning the Benthos system's capability to meet the speed requirements with the system configuration proposed.

In response to the Navy's concerns, Benthos submitted detailed test reports and analyses concerning the speed capability of its SeaRover. The Navy reviewed these test reports and other test results provided by the Naval Mine Warfare Engineering Activity and concluded that the Benthos SeaRover as proposed would meet the salient characteristics. The Navy then again revised the salient characteristics to change the power consumption and requested best and final offers (BAFOs) from all offerors. In its BAFO, Benthos again offered its SeaRover system as well as an alternate offer for its Super SeaRover. All offers received in response to the BAFO request were determined to be technically acceptable. The contracting officer determined

that Benthos was the low offeror (for both its basic and alternate offers) and selected that firm for award (on the alternate offer) which was made on January 19, 1990, in the amount of \$427,790.

The protester contends that the Super SeaRover equipment offered by Benthos does not meet the speed requirements of the salient characteristics.^{1/} Deep Ocean maintains that the Navy conducted extensive negotiations with Benthos that resulted in changes to the salient characteristics in an attempt to insure that the Benthos equipment met all the salient characteristics. Deep Ocean believes that it should have been afforded similar extensive negotiations.

In determining whether a particular item meets the solicitation's technical requirements set forth as salient characteristics, a contracting agency enjoys a reasonable degree of discretion, and we therefore will not disturb its technical determination unless it is shown to be unreasonable. See Panasonic Indus. Co., B-207852.2, Apr. 12, 1983, 83-1 CPD ¶ 379. Further, the protester must show that the agency's determination was unreasonable; the protester's mere disagreement with the agency's technical judgment does not make it unreasonable. VARTA Batterie AG, B-225484, Mar. 19, 1987, 87-1 CPD ¶ 311.

With respect to the speed requirement, the revised salient characteristics provided the following:

"2.3.2. Speed. The ROV shall be able to maintain a headway of 1 knot against a 1 knot current under the following conditions:

- a. Vehicle depth of 300 feet minimum;
- b. Optional equipment installed; and
- c. A 1500 ft. umbilical attached with a minimum of a 500 ft. standoff."

^{1/} Deep Ocean in its initial protest also argued that the Benthos equipment did not meet several other salient characteristics such as operating depth, joystick, and light placement. The Navy responded to these allegations in its report explaining that Benthos's equipment met these salient characteristics. Deep Ocean offered no further argument or evidence in support of these contentions and, thus, we find the firm has abandoned these issues. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

Deep Ocean argues that it is extremely unlikely that the Benthos Super SeaRover can meet the revised speed requirements of the RFP due to the "drag" of the tether and lack of sufficient thrust. To support its position, Deep Ocean has provided our Office a formula developed by a competitor which allegedly demonstrates that Deep Ocean's Phantom HVS4 can meet the RFP speed requirement and Benthos's equipment cannot.^{2/}

We do not think that Deep Ocean, with its calculations based on its formula, has demonstrated that the Navy's conclusion that the Benthos Super SeaRover complied with all the speed requirements of the RFP was unreasonable. This is especially so given the fact that Deep Ocean, in its calculations, did not use actual data, but used "generously optimistic" assumed values for unknown parameters of the Benthos vehicle. It is clear from the record that the Navy was concerned about the Benthos equipment's ability to meet the RFP speed requirements. In this regard, the Navy did not merely rely on Benthos descriptive literature but also evaluated test reports and analyses submitted by Benthos and test results received from the Naval Mine Warfare Engineering Activity prior to determining that the Benthos equipment as proposed would meet the RFP speed requirements. Further, Benthos took no exception to the RFP requirements. Benthos stated in its proposal that its vehicle was "capable of maintaining a headway of at least 1 knot against a 1 knot current at a minimum of 300 feet [with the tether]." The test reports, analyses, and other information supplied by Benthos to the Navy firmly supported the equipment's claimed performance. Therefore, based on the record here, Deep Ocean has not provided a basis for challenging the Navy's conclusion that the Benthos vehicle complied with all the material requirements of the RFP.

Deep Ocean continues to maintain in its response to the Navy's report that the salient characteristics were relaxed in order to insure that the Benthos vehicle met all the salient characteristics. However, our review of the record indicates that the Navy initially found Benthos's proposal

^{2/} Under this formula, it appears that Deep Ocean's HVS4 also would not meet the speed requirements of the RFP. However, Deep Ocean maintains that this was the result of a misunderstanding of the interpretation of its descriptive literature. Deep Ocean, for its own calculation, allegedly used updated performance data resulting from actual in-water tests to determine that its equipment complies with the speed requirements.

to be technically acceptable with respect to all requirements.

It was only after the speed requirements were revised did the Navy question whether the Benthos vehicle was capable of meeting it. Furthermore, except for the speed requirements, Benthos's descriptive literature satisfied the Navy that Benthos's vehicle would meet the salient characteristics. All other revisions to the salient characteristics had no bearing on the acceptability of the Benthos's vehicle. Consequently, there is no basis whatsoever for Deep Ocean's assertion that the Navy relaxed the specifications in order to qualify the Benthos vehicle.

Further, to the extent Deep Ocean contends that the procurement was improperly conducted because "extensive negotiations" were held with Benthos and not with Deep Ocean, the record indicates that Deep Ocean's vehicle met all the salient characteristics at a reasonable price. In such circumstances, a mere request for BAFOs satisfied the requirement for discussions with Deep Ocean. See Information Management Inc., B-212358, Jan. 17, 1984, 84-1 CPD ¶ 76.

Finally, Deep Ocean maintains that by specifying "Deep Ocean Engineering Phantom HVS4 or equal," the government placed it at an unfair price disadvantage since it was essentially "locked into" specifying a Phantom HVS4 instead of one of its lesser vehicles. Contrary to the protester's argument, the RFP did not limit it to offering only the brand name specified. The brand name or equal clause contained in the RFP specifically provided the following:

"Proposals offering "equal" products including products of the brand name manufacturer other than the one described by brand name will be considered for award if such products are clearly identified in the proposals and are determined by the Government to meet fully the salient characteristics requirements referenced in the request for proposals."

Clearly, Deep Ocean could have offered any of its lesser vehicles if it could demonstrate their ability to satisfy

the salient characteristics. Moreover, nothing prevented Deep Ocean from submitting alternate proposals offering any of its other vehicles to meet the RFP requirements.

The protest is denied.

for Robert P. Murphy
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General Counsel